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# A Review Of The Proposed Michigan Rules Of Evidence

By James K. Robinson and John W. Reed

## INTRODUCTION

On January 6, 1977, the Supreme Court of Michigan entered an order stating that it is considering adoption of the proposed Michigan Rules of Evidence which were submitted to the Court by the committee which it appointed in March 1975. The Court has solicited comments from interested persons regarding the proposed rules. A copy of the Supreme Court's order is published in this issue of the Bar Journal. The proposed rules are published in the January 26, 1977, issue of North Western Reporter, Second Series (Michigan Edition). The purpose of this article is to review in general the background and substance of the proposed rules. More detailed information concerning the rules may be obtained by consulting the text of the rules and the committee notes thereto.

It is beyond the scope of this article to discuss in detail the policy considerations supporting adoption of each proposed rule which conflicts with prior Michigan law. For the most part the proposed rules are identical with the Federal Rules of Evidence and the policy considerations favoring adoption of the rules are discussed in the Federal Advisory Committee Notes and the legislative history of the Federal Rules.

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## EVIDENCE LAW REFORM GENERALLY

The first major effort to reform the law of evidence was undertaken by the American Law Institute in 1939. The product of that effort was the publication of the Model Code of Evidence in 1942. At that time Professor Morgan, in his foreword to the Model Code, said:

"[T]he rules of evidence have become so complicated as to invite comparison with equity pleading, of which Story wrote that the ability to understand and apply them 'requires various talents, vast learning, and a clearness and acuteness of perception, which belong only to very gifted minds' ... It is time ... for radical reformation of the law of evidence." Morgan, Foreword, American Law Institute, Model Code of Evidence 5 (1942).

The Model Code achieved little success in reforming the law of evidence. In 1953 the National Conference of Commissioners on Uniform State Laws published the Uniform Rules of

Evidence, which substantially revised the Model Code. Although the Uniform Rules were well received by judges, lawyers and law professors, the rules were enacted only by the Virgin Islands. In 1965 the California Legislature enacted the California Evidence Code. The California Code is based upon the Uniform Rules; however, the legislature modified them to comply with California policy and practice. In 1967, the New Jersey Supreme Court promulgated a modified version of the Uniform Rules.

In 1965 the United States Supreme Court appointed a committee to formulate rules of evidence for the federal courts. The Federal Rules of Evidence were enacted by Congress and became effective July 1, 1975. At this writing at least six states have adopted rules of evidence patterned after the Federal Rules. These states are Wisconsin, Nevada, New Mexico, Nebraska, Maine and Arkansas. A number of other states are in the process of considering adoption of evidence rules similar to the Federal Rules.

For a more detailed discussion of the background of evidence law reform, including the background of the Federal Rules of Evidence, see Spangenberg, *The Federal Rules of Evidence – An Attempt at Uniformity in Federal Courts*, 15 Wayne L Rev 1061 (1969); Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 Fed B J 225 (1973); Berger, *An Introduction to the Federal Rules of Evidence*, 2 Litigation No. 1, p 8 (Fall 1975).

### EVIDENCE LAW REFORM IN MICHIGAN

The prospect of imminent adoption of the Federal Rules of Evidence prompted the Board of Commissioners of the State Bar of Michigan to appoint a special committee in 1974 to consider the feasibility of adopting rules of evidence for Michigan. The special committee issued a report endorsing "the concept of a Michigan evidence code which adheres to the federal rules of evidence except where particular state considerations require deviation." In support of its conclusion, the special committee quoted from the report of the California Law Revision Commission recommending codification of California evidence law:

"In few, if any, areas of the law is there as great a need for immediate and accurate information as there is in the law of evidence. On most legal

questions, the judge or lawyer has time to research the law before it is applied. But questions involving the admissibility of evidence arise suddenly during trial. Proper objections — stating the correct grounds — must be made immediately or the lawyer may find that his objection has been waived. The judge must rule immediately in order that the trial may progress in an orderly fashion. Frequently, evidence questions cannot be anticipated and, hence, necessary research often cannot be done beforehand.

There is, therefore, an acute need for a systematic, comprehensive, and authoritative statement of the law of evidence that is easy to use and convenient for immediate reference." West's California Evidence Code XXIII (1968).

The State Bar Board of Commissioners adopted a resolution in December 1974 endorsing the report of its special evidence committee. See *Report of the State Bar Special Committee on Uniform Rules of Evidence*, 53 Mich State B J 765 (1974). On March 19, 1975, the Supreme Court of Michigan issued an order constituting and appointing a committee to prepare



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proposed Michigan Rules of Evidence. See Robinson, *The Impact of Federal Rules of Evidence on Michigan Evidence Law*, 54 Mich State B J 193 (1975). The committee consisted of representatives from the Judiciary, the Legislature and the State Bar. Persons serving on the committee had diversified backgrounds and virtually every segment of the legal community was well represented.

### HOW THE PROPOSED RULES WERE DRAFTED

The manner in which the Supreme Court Evidence Committee prepared its proposed rules is described in the Prologue to the rules:

"At [its first] meeting the Committee unanimously agreed that it would draft Michigan Rules of Evidence generally patterned on the Federal Rules of Evidence. Thereafter, the Committee proceeded to consider proposed rules of evidence using the outline of the Federal Rules of Evidence as the agenda for the Committee's work.

\* \* \*

"Before each meeting an agenda was established and circulated to Committee members setting the proposed rules to be considered at the Committee's next meeting. In addition, before each meeting, legal memoranda were forwarded to Committee members discussing the impact on Michigan law which would occur through adoption of the proposed rules . . .

"At the Committee's meetings the rules were taken up in the order set out in the Federal Rules of Evidence. After discussion of a proposed rule and its impact on existing Michigan law, motions were entertained to adopt a form of the rule under consideration. These motions were discussed and thereafter voted on by the Committee. At the conclusion of the Committee's adoption of a full set of proposed counterpart rules to the Federal Rules of Evidence, one meeting . . . was devoted to a review of all

rules previously adopted to determine whether changes in specific rules should be made by the Committee in light of the entire set of rules adopted. A number of changes were made at that meeting.

"Thereafter, the Chairman and Reporter prepared a draft of committee notes. This draft was circulated for review by the Committee, together with several proposed technical changes in the rules. At its [last] meeting . . . the Committee approved the final draft of the Proposed Michigan Rules of Evidence with Committee Notes. At this meeting the Committee authorized the Chairman and Reporter to make all necessary changes in the proposed rules and committee notes and at the earliest possible date thereafter to submit the draft to the Supreme Court of Michigan for its consideration. The Committee directed the Chairman and Reporter to communicate to the Court that the Committee recommends that these proposed Michigan Rules of Evidence be adopted by the Court." Prologue, Proposed Michigan Rules of Evidence.

The source and format of the proposed rules are described in the Committee's General Comment:

"The Michigan Rules of Evidence are drawn in large part from the Federal Rules of Evidence, which took effect July 1, 1975. The Committee Note following each Michigan rule indicates its source. When that source is the corresponding federal rule, the Michigan Committee Note usually does not restate the rule's background or comment on its meaning. Rather the Federal Advisory Committee Notes and Congressional reports are allowed to speak for themselves. The few exceptions, in which there are 'Committee Comments,' are instances in which the Michigan Committee doubts or disagrees with views suggested in the federal pre-enactment materials, or in which the Committee has devised a variant rule.

"The Committee's statements regarding 'Impact on Prior Michigan Law'

merely indicate the Committee's perceptions of the correspondence, or lack of it, between the rules and prior Michigan law. Prepared as an aid to Bench and Bar in the transition from prior Michigan law to these rules, these statements are descriptive only, and not prescriptive. They are not to be carried forward as a gloss on the new rules." General Comment, Proposed Michigan Rules of Evidence.

The proposed Michigan Rules of Evidence were submitted to the Supreme Court in January 1977 and simultaneously published for comment in the North Western Reporter, Second Series (Michigan Edition) pursuant to the Court's January 6, 1977, order which is published in this issue of the Bar Journal.

#### **A BRIEF DESCRIPTION OF THE MRE**

As stated in the General Comment to the proposed Michigan Rules of Evidence (MRE), the proposed rules are drawn in large part from the Federal Rules of Evidence. A major difference in approach exists between the method of adopting the Federal Rules and the method contemplated for adopting the Michigan Rules. The Federal Rules were enacted by Congress. The Michigan Rules will be adopted by the Supreme Court of Michigan. Adoption of the rules by the Court rather than enactment by the Legislature is consistent with the Michigan Supreme Court's view of the power committed to it by the Michigan Constitution. In *Perin v Peuler*, 373 Mich 531, 541 (1964), the Court said:

"The function of enacting and amending judicial rules of practice and procedure [including the rules of evidence] has been committed exclusively to this Court (Const 1908, art 7, § 5; Const 1963, art 6, § 5); a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will." Accord *People v Jackson*, 391 Mich 323, 366 (1974).

With only minor changes to conform the Federal Rules to state use, the Michigan Rules of Evidence and the Federal Rules are identical with the following principal exceptions:

1. MRE 202 (Judicial Notice of Law);
2. MRE 302 (Presumptions in Criminal Cases);
3. MRE 404 (Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes);
4. MRE 606 (Competency of Jurors as Witnesses);
5. MRE 609 (Impeachment by Conviction of Crime);
6. MRE 611(b) (Scope of Cross-examination);
7. MRE 612 (Writing or Object Used to Refresh Memory);
8. MRE 801(d)(1)(A) (hearsay — prior inconsistent statements).

The nature of the differences between the proposed Michigan Rules and the Federal Rules is such that little, if any, damage is done to the advantage of uniformity between federal and state evidence law which will be gained through the adoption of the proposed Michigan evidence rules.

We shall now briefly describe the proposed Michigan Rules, noting the significant differences between them and the Federal Rules and existing Michigan law.

#### **Article I General Provisions**

By virtue of the scope rule, MRE 101, the Michigan Rules of Evidence govern all proceedings in Michigan courts with the exception of four kinds of situations specified in MRE 1101: determination of preliminary questions of fact, grand jury proceedings, summary contempt proceedings, and a group of miscellaneous proceedings, e.g., sentencing, and granting or revoking probation.

In keeping with the Michigan constitutional concept of judicial suprem-

acy in matters of practice and procedure (see *Perin v Peuler*, 373 Mich 531 (1964)), the Michigan Rules of Evidence govern even when there is a contrary statute (e.g., MRE 601 effectively displaces the Dead Man's Act). MRE 101, provides, however, that statutory evidence rules not in conflict with the Michigan Rules of Evidence remain in effect (e.g., MRE 501 preserves existing privileges, most of which are statutory).

As the title suggests, the six rules in Article I deal with concepts, most of them orthodox and familiar, applicable to the presenting and receiving of evidence generally. For example, the rules are to be construed "to the end that the truth may be ascertained and proceedings justly determined" (MRE 102); inadmissible evidence is not to be suggested to members of the jury by offers of proof or by improper questions in their hearing (MRE 103 (c)); harmless error is not ground for reversal (MRE 103 (a)); offers of proof generally are required (MRE 103(a)(2)); the court must instruct on admissibility for a limited purpose (MRE 105); and the traditional rule of "completeness" directs the admission of the remainder of a writing (or another writing) "which ought in fairness to be considered contemporaneously" with the writing already introduced (MRE 106).

MRE 104 clarifies judge and jury roles in determining questions concerning the qualification of witnesses, the existence of privileges, and the admissibility of evidence. Such questions are generally for the court; and in determining those questions, the court is not bound by the rules of evidence except those relating to privileges. However, when relevancy of evidence depends on the fulfillment of a condition of fact, the court is to admit it "upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of

the condition."

This scheme is consistent with prior Michigan law generally, although there are aberrant holdings. MRE 104(d), however, which provides that an accused does not, merely by testifying on a preliminary matter, subject himself to cross-examination as to other issues in the case, departs from the holding in *People v Johnson*, 382 Mich 632, 640 (1969), that a defendant by taking the stand waives his right to refuse to answer "any question that may be material to the case and which would, in the case of any other witness, be legitimate cross-examination."

## Article II Judicial Notice

MRE 201 provides an orthodox pattern of judicial notice of "adjudicative facts," i.e., the facts of the particular case. In keeping with Michigan and general authorities, facts are made judicially noticeable when they are "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201 sets forth the procedure for taking judicial notice, and it makes the judicially noticed fact conclusive on the jury in a civil action, but not in a criminal case.

MRE 202, dealing with judicial notice of law, has no counterpart in the Federal Rules, it being the position of the Federal Advisory Committee that "the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure." The Michigan Committee concluded that the convenience of lodging the judicial notice of law rule adjacent to the judicial notice of fact rule outweighed conceptual concerns; accordingly it drafted MRE 202, patterned after Rule 9 of the Uniform Rules of Evidence (1953).

In essence **MRE 202** assumes that the law of the various American jurisdictions should be treated as domestic law, subject to judicial notice, a reflection of the effectiveness of modern publishing and communication practices. Private acts, ordinances and regulations of governmental subdivisions or agencies of Michigan, and the law of foreign countries are also judicially noticeable, but only if a party so requests, furnishes the court with helpful information, and has given adverse parties adequate notice. **MRE 202** represents a modest liberalization of the procedures heretofore established by MCLA 600.2114a, 600.2118a (3), and 24.261(6).

### Article III Presumptions

**MRE 301** provides that civil presumptions shift only the burden of going forward with evidence, and not the burden of persuasion. In so providing the rule is identical with the corresponding federal rule. Once a presumption shifts the burden of going forward with evidence, the party in whose favor it operates is entitled to a directed verdict on the issue if the adversary produces no evidence rebutting the presumption. In short, it is a mandatory inference.

When rebutted the presumption disappears, a development sometimes termed "the bursting of the bubble." The implication is not entirely accurate, however, because **MRE 301**, like its federal counterpart, permits the basic facts of a rebutted presumption, if logically supportive, to serve nevertheless as the basis of an inference and allows the judge to inform the jury of that permissible inference.

In all of this, **MRE 301** is consistent with prior Michigan law except for some cases indicating that one traditionally strong presumption — that of undue influence when a fiduciary benefits from a relationship of trust — may shift the burden of persuasion.

See *e.g.*, *Totorean v Samuels*, 52 Mich App 14 (1974).

**MRE 302**, dealing with presumptions in criminal cases, has no counterpart in the Federal Rules, Congress having preferred to deal with the subject in connection with its pending revision of the federal criminal code. **MRE 302**, which deals only with procedural matters and not validity, makes clear that a criminal presumption is never mandatory, that the proof beyond a reasonable doubt requirement is not affected, and that when instructing the jury the court should state that "it may, but need not, *infer* the existence" of the presumed fact from the basic facts. (Emphasis added.) In all of these matters, **MRE 302** is consistent with prior Michigan law.

### Article IV Relevancy and Its Limits

The first three rules of Article IV deal with relevancy generally, and the remaining eight deal with particular applications in areas frequently recurring.

**MRE 401** views the issue of relevance as essentially one of logical or rational relationship between evidence offered and facts that are "of consequence to the determination of the action." The quoted phrase has the same meaning as the more traditional term, "material," a term generally avoided in the federal and proposed Michigan rules.

The test of relevancy is whether the evidence has "any tendency" to make the disputed fact "more probable or less probable than it would be without the evidence." On the whole, the relevancy threshold is low and the rule is generally consistent with prior Michigan law.

**MRE 402**, essentially a technical provision, excludes irrelevant evidence and admits all relevant evidence "except as otherwise provided by the Constitution of the United States, the

Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court."

Perhaps no provision of the proposed rules will have a more pervasive effect than **MRE 403**, which reads as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The rule directs a weighing of probative value against the "costs" of the evidence in terms of the prejudice, confusion, or waste of time. The rule is consistent with prior Michigan law. *People v Der Martzex*, 390 Mich 410, 415 (1973). However, the scheme of **MRE 401** and **403**, which requires counsel and the court to consider relevancy questions in three steps — first, testing for probative value; second, identifying the "costs;" and third, weighing probative value against prejudice, etc. — should produce clearer, wiser and fairer rulings.

**MRE 404**, the first of eight rules dealing with relevance questions in particular settings, adopts the orthodox prohibition against the use of a trait of character to prove that an individual acted in conformity therewith on a particular occasion. The rule then adopts three familiar exceptions: First, one accused of a crime may offer evidence of his good character, and the prosecutor may then join the issue and offer evidence of bad character; second, the accused may offer evidence of a pertinent trait of character of the victim of the crime, and the prosecutor may rebut; and third, parties may offer evidence of the character of a witness bearing on credibility, as provided in some detail in **MRE 607**, **608**, and **609**.

**MRE 404** differs from its federal

counterpart, however, in excluding evidence of the character of the victim of a sexual conduct crime, except for evidence of the victim's past sexual conduct with the accused and evidence of specific instances of sexual activity to show the source or origin of semen, pregnancy, or disease, and then only if the court determines that probative value is not "substantially outweighed" by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The rule is thus consonant with Michigan's recently enacted statute covering sexual conduct crimes. See MCLA 750.520j.

**MRE 405** identifies the appropriate methods of proving character. Generally character may be proved only by reputation or opinion; but in those cases in which character is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct. **MRE 405**, which is identical with Federal Rule 405, departs from prior Michigan law — and common law generally — in permitting proof of character by opinion as well as by reputation evidence.

**MRE 406** follows prior Michigan law in making admissible evidence of the habit of a person or the routine practice of an organization to prove that the conduct of the person or organization on a particular occasion was in conformity with that habit or routine practice.

**MRE 407** follows Michigan prior practice in making evidence of remedial measures taken after an event inadmissible to prove negligence or culpable conduct. For similar policy reasons, **MRE 408** renders inadmissible evidence of compromises and offers to compromise. In one aspect, however, this latter rule changes prior Michigan law. It states that "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." Michigan has traditionally admitted factual statements made



during compromise negotiations, protecting, for practical purposes, only express settlement offers and hypothetical statements. Believing the orthodox rule a trap for the unwary, and in any event inconsistent with the general purposes of the rule, the Michigan Committee elected to employ the language quoted, which is also contained in Federal Rule 408.

In yet another protective provision, **MRE 409** makes evidence of paying or promising to pay medical and similar expenses inadmissible to prove liability for the injury treated.

**MRE 410** renders inadmissible pleas of guilty later withdrawn, pleas of nolo contendere, offers to plead guilty or nolo contendere, and statements made in connection with any of the foregoing pleas or offers. Prior Michigan cases agree that a plea of guilty later withdrawn and statements made in connection therewith are inadmissible, but they are less clear as to the admissibility of *offers* to plead guilty or nolo contendere. To the extent that certain prior Michigan cases may be read to allow evidence of such offers, they are rejected by **MRE 410**. **MRE 410** further provides, however, for the admissibility in perjury cases of evidence of statements made in connection with pleas and offers to plead when made by defendant under oath, on the record, and in the presence of counsel. The Michigan Committee found no Michigan authority inconsistent with that provision.

Finally, **MRE 411** makes evidence of liability insurance inadmissible to prove negligence or wrongful conduct. In the form adopted, however, this familiar rule does not require the exclusion of such evidence when offered for another purpose, such as proof of ownership or control, or the bias of a witness, and in this regard may change prior Michigan law which appears to have prohibited introduction of liability insurance for all purposes,

not merely to show the insured's negligence.

## Article V Privileges

In common with the Federal Rules of Evidence but for somewhat different reasons, the Michigan Rules of Evidence contain no provisions dealing with specific privileges. **MRE 501** reads as follows:

"The privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law except as modified by statute or court rule."

Thus, the rule carries forward prior Michigan law with respect to privileges, whether common-law in origin, *e.g.*, the attorney-client privilege, or statutory, *e.g.*, the physician-patient privilege.

## Article VI Witnesses

**MRE 601** reads:

"Every person is competent to be a witness except as otherwise provided in these rules."

The United States Supreme Court's Advisory Committee, commenting on identical language in its draft, said:

"This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article."

Most of the common-law grounds of incompetency have long since been eliminated in Michigan as elsewhere, *e.g.*, conviction of infamous crime, interest in the outcome of litigation, marriage, etc. **MRE 601** is inconsistent with prior Michigan law, however, in eliminating the few grounds that remain.

Chief among these is the Dead Man's Act, MCLA 600.2116; GCR 1963, 608. The 1967 amendment to the Act permitting a party to testify as to matters "equally within the knowl-

edge of the person incapable of testifying" if "some material portion of his testimony is supported by some other material evidence tending to corroborate his claim" has had the effect of diminishing the exclusionary force of the Act already, particularly because the cases have required very little corroboration to avoid the statute.

**MRE 601** is inconsistent also with prior Michigan cases suggesting that determinations of competency to testify where there are problems of mental or moral qualification are within the court's discretion. The question of mental capacity is particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence; and standards of moral qualifications are dealt with by the manner of administering the oath under **MRE 603**.

**MRE 602** requires the witness to have personal knowledge of the matter testified to (except in the case of opinion testimony by expert witnesses), and **MRE 603** requires him to "declare that he will testify truthfully, by oath or affirmation administered in the form calculated to awaken his conscience and impress his mind with his duty to do so." In both regards the new rules effect no change in Michigan law.

**MRE 604** somewhat tightens the procedure for using interpreters, requiring them to be sworn and to be qualified as experts.

**MRE 605** and **606** render judge and juror incompetent to testify in the trial of the case in which they are sitting, and no apparent change in Michigan practice is effected thereby.

Federal Rule 606 contains a provision dealing with whether testimony, affidavits, or statements of a juror may be received for the purpose of invalidating or supporting a verdict or indictment. **MRE 606** contains no counterpart, the Michigan Committee

having concluded that the question is one of substantive law rather than of evidence and that, in any event, the area is inappropriately governed by an inflexible rule, being more suitably subject to case law development.

**MRE 607** is the first of three rules dealing with impeachment of witnesses. It provides simply that:

"The credibility of a witness may be attacked by any party, including the party calling him."

Although inconsistent with the orthodox and Michigan view that a witness' credibility generally may not be attacked by the party calling him, the new rule represents a less than startling change because of the numerous exceptions to the traditional rule. For example, prior Michigan law recognized the right of a party to impeach his own witness if the witness was adverse or hostile, if the party was taken by surprise by the witness' testimony, if the witness was a *res gestae* witness whom the prosecution was obliged to call, or where the witness' recollection needed to be refreshed by his prior inconsistent statements.

**MRE 608** provides that the credibility of a witness may be attacked by evidence of character for untruthfulness (and, if attacked, supported similarly). The evidence may be in the form of reputation, and to that extent the rule is wholly consistent with prior Michigan law. The rule provides also, however, that the evidence may be in the form of opinion, and to that extent it is inconsistent with prior Michigan law.

**MRE 608(b)** prohibits extrinsic proof of specific instances of conduct (other than convictions) bearing on credibility, but it permits, in the court's discretion, cross-examination about specific instances if deemed probative of truthfulness or untruthfulness. Except that the cases do not clearly limit inquiry to conduct probative of truthfulness or untruthfulness, **MRE 608(b)** is generally in accord with prior Michigan law.

In the sessions of the Michigan Committee, as in the Congressional hearings, the question of impeachment of a witness by evidence of conviction of a crime, covered by **MRE 609**, generated more discussion and controversy than any other rule. The proposed Michigan rule is identical with its federal counterpart with respect to what might be called the four auxiliary provisions: (b) time limit; (c) effect of pardon, annulment, or certificate of rehabilitation; (d) juvenile adjudications; and (e) pendency of appeal. With respect to the general rule stated in subdivision (a), however, the proposed Michigan rule differs from the federal equivalent by creating separate rules, one applicable only to criminal defendants (**MRE 609(a)(1)**) and another applicable to all other witnesses (**MRE 609(a)(2)**).

The heart of **MRE 609(a)** is a division of crimes into two categories (crimes punishable by death or by imprisonment in excess of one year, and crimes involving dishonesty or false statement regardless of the punishment), which are then applied somewhat differently to a witness-accused and to all other witnesses.

With respect to *all* witnesses, including a witness-accused, conviction of a serious crime (*i.e.*, one punishable by death or by imprisonment for more than a year) but not involving dishonesty or false statement, may be shown only if "the court determines that the probative value of admitting this evidence on the issue of credibility outweighs its prejudicial effect."

As to the other category of crimes (those that involve dishonesty or false statement, without regard to severity of punishment) a distinction is drawn between a witness-accused and all other witnesses. In the case of the witness-accused, conviction of a crime involving dishonesty may be admitted, again, only if the court determines that probative value outweighs prejudicial effect; but as to all other witness-

es, the court has no discretion to exclude evidence of such a conviction for impeachment purposes. Thus, the principal departures from prior Michigan law are:

1) Misdemeanor convictions are made admissible to impeach witnesses in criminal cases if the misdemeanor involves dishonesty or false statement and, in the case of a witness-accused, the court determines that the conviction is more probative on the issue of credibility than unfairly prejudicial. *Cf. People v Renno*, 392 Mich 45 (1974) (no misdemeanor impeachment in criminal cases).

2) Misdemeanor convictions are made admissible to impeach witnesses in civil cases only if the misdemeanor involves dishonesty or false statement. *Cf. Sting v Davis*, 384 Mich 608 (1971) (traffic misdemeanors allowed to impeach driver-witnesses in automobile negligence cases).

3) Felony convictions not involving dishonesty or false statement are admissible in all types of cases only if the court determines that probative value on credibility outweighs prejudicial effect. *Cf. Sting v Davis, supra* (no discretion in a civil case to deny cross-examination regarding the driving record of a plaintiff-driver or a defendant-driver).

**MRE 609(b)** establishes a presumptive "statute of limitations," generally excluding proof of convictions more than ten years after release of the witness from the confinement imposed for that conviction, a rule somewhat more precise than but generally in accord with the principle of *People v Jackson*, 391 Mich 323 (1974).

**MRE 609(d)**, though providing for the general inadmissibility of evidence of juvenile adjudications, does authorize a court in a criminal case to admit evidence of a juvenile adjudication of a witness other than the accused where such an offense would be admissible to attack the credibility of

an adult and the court is "satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence."

Although MCLA 712A.23 purports to bar the use of a juvenile adjudication "for any purpose whatever," the Court of Appeals in a series of cases since 1971 has followed a rule similar to **MRE 609(b)**. See, *e.g.*, *People v Hawkins*, 58 Mich App 69 (1975).

**MRE 610**, making evidence of religious beliefs or opinions inadmissible on credibility, is in accord with prior Michigan law.

**MRE 611**, dealing with mode and order of interrogation and presentation, has three subdivisions: (a) control by court; (b) scope of cross-examination; and (c) leading questions. All three are consistent with prior Michigan law.

The only controversial question in the rule is that of scope of cross-examination. The Federal Rules of Evidence retained the federal and majority practice of limiting cross-examination to the subject matter of the direct examination and, of course, matters affecting the credibility of the witness. **MRE 611(b)** conforms with prior Michigan law and adopts the rule of broad scope, subject to limitation by the judge "in the interests of justice."

**MRE 612** establishes, in some detail, the procedure to be followed when a writing or object is used to refresh a witness' memory. In general, it is designed to give an adversary access to the item that has been used to refresh. The court may require production of a writing or object that was used to refresh the memory of the witness even before he took the stand. Here a matter of discretion, the requirement may have been mandatory in prior Michigan practice. See *Miles v Clairmont Transfer Co.*, 35 Mich App 319 (1971).

**MRE 613** deals with prior state-

ments of witnesses. **MRE 613(a)** rejects prior Michigan practice, based on the rule in "The Queen's Case," requiring a written statement to be shown to the witness before he is cross-examined on it. The new rule eliminates the requirement of a prior display, providing only that "on request the same shall be shown or disclosed to opposing counsel."

**MRE 613(b)**, relating to extrinsic evidence of prior inconsistent statements, retains the familiar foundation requirement but in modified form: it is sufficient that the witness be afforded an opportunity to explain or deny the prior statement and the opposite party afforded an opportunity to interrogate him thereon. The opportunity need not precede proof of the prior statement.

**MRE 614** makes explicit the time-honored power of a court to call witnesses and interrogate them. There clearly is Michigan authority for the latter proposition, less clearly for the former.

**MRE 615** requires, with certain exceptions, the exclusion of witnesses on request of a party. Michigan cases have held such exclusion discretionary with the trial court; the mandatory exclusion under the rule is to that extent inconsistent with prior Michigan law.

## Article VII

### Opinions and Expert Testimony

The six rules dealing with opinions and expert testimony are drawn verbatim from the Federal Rules of Evidence. These rules have been widely regarded as a significant liberalization of the rules and procedures governing such testimony. Viewed in the light of prior Michigan law, however, they represent somewhat less change in this jurisdiction.

**MRE 701** (opinion testimony by lay witnesses) and **MRE 702** (testimony by experts) make the threshold test for

admissibility of opinion that of "value" or "helpfulness" or "assistance," rather than the more restrictive test of "necessity."

Roughly stated, under the necessity principle opinion by a lay witness is admitted only if the witness needs to employ it in order to communicate adequately with the trier of fact, and opinion by an expert is admissible only when needed for understanding by the trier of fact. Under the value test, lay opinion is admissible if it is helpful to a clear understanding of the witness' testimony and the testimony of an expert is admissible if it will assist the trier of fact to understand the evidence.

Although the difference is to some extent one of semantics, the value test encourages significantly greater admissibility. The Michigan cases have tended in that direction; but to the extent that there has been doubt in the cases, **MRE 701** and **702** resolve it by adopting the value test.

The significant provision in **MRE 703**, dealing with bases of opinion testimony by experts, is that the facts or data on which an expert bases an opinion need not be admissible in evidence "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Although there is some supporting Michigan authority for this proposition, it appears to be inconsistent with the majority of Michigan cases.

**MRE 704** provides that opinion testimony is not objectionable merely because it "embraces an ultimate issue to be decided by the trier of fact." The rule is consistent with prior Michigan law as to testimony of experts, but it is not clear that Michigan has permitted lay opinions on ultimate issues. In any event, the new rule permits such opinions if they are otherwise admissible ("helpful," among other things).

**MRE 705** permits the expert to give an opinion and the reason therefor without prior disclosure of the underlying facts, these being left to cross-examination, unless the court requires otherwise. This accords with prior Michigan practice.

**MRE 706** authorizes and provides procedural rules governing court-appointed experts, a practice not provided for in prior Michigan law. Of primary interest are the provisions authorizing the court in its discretion to disclose to the jury the fact that the court appointed the witness, and permitting the parties to call expert witnesses of their own choice.

### **Article VIII Hearsay**

Article VIII of the proposed Michigan Rules of Evidence deals with the hearsay rule and is substantially identical with Article VIII of the Federal Rules of Evidence. The sole exception is that **MRE 801(d)(1)(A)**, which governs the admissibility of prior inconsistent statements of witnesses, is identical with the United States Supreme Court version of Federal Rule 801(d)(1)(A) rather than the version subsequently adopted by Congress.

**MRE 801(a),(b)** and **(c)** contain the definitional elements of the hearsay rule. The definition of hearsay in **MRE 801(c)** is consistent with prior Michigan law:

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

**MRE 801(a)** defines a "statement" for purposes of the hearsay rule to exclude statements or conduct not intended as an assertion. Accordingly, it is consistent with the Supreme Court's recent decision in *People v Stewart*, 397 Mich 1, 9-10 (1976).

**MRE 801(d)(1)** governs the admis-

sibility of certain prior statements of witnesses. **MRE 801(d)(1)(A)** provides that "[a] statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is ... inconsistent with his testimony ..." **MRE 801(d)(1)(A)** differs from the counterpart Federal Rule which requires that the statement must also have been "given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition ..." **MRE 801(d)(1)(A)** is inconsistent with prior Michigan law which limits the admissibility of prior inconsistent statements to the purpose of impeaching credibility and prohibits their use as substantive evidence.

For the policy arguments supporting these alternative rules, see the Advisory Committee Note and legislative history regarding Federal Rule 801(d)(1)(A).

**MRE 801(d)(1)(B)** is inconsistent with prior Michigan law in admitting as substantive evidence (as well as for rehabilitation of credibility) prior consistent statements of a witness "to rebut an express or implied charge against him of recent fabrication or improper influence or motive ..." Michigan courts have admitted prior consistent statements for these purposes, but only on the issue of credibility and not as substantive evidence.

**MRE 801(d)(1)(C)** is consistent with prior Michigan law in admitting the testimony of a witness as to his own prior identification of a person made after perceiving him. The only difference between **MRE 801(d)(1)(C)** and prior Michigan law is that Michigan has previously treated statements of prior identification as an exception to the hearsay rule, while **MRE 801(d)(1)(C)** provides that such statements are not hearsay at all.

**MRE 801(d)(2)** governs the admissibility of certain admissions by a

party-opponent. Prior Michigan law treated party admissions under an exception to the hearsay rule, while **MRE 801(d)(2)** provides that they are not hearsay at all. **MRE 801(d)(2)(A)** is consistent with prior Michigan law in admitting statements of a party against the party. Under **MRE 801(d)(2)(A)** a guilty plea by a party would be admissible against him in a subsequent civil action arising out of the same occurrence.

To this extent **MRE 801(d)(2)(A)** is inconsistent with the Supreme Court's recent decision in *Wheelock v Eyl*, 393 Mich 74, 79 (1974), in which the Court stated that: "A criminal conviction after trial, or plea, or payment of a fine is not admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence." *Wheelock* involved the admissibility of payment of a traffic ticket in a subsequent automobile negligence case arising out of the same occurrence. Certain dicta in the case have been criticized:

"The Michigan Supreme Court, although reaching the correct result on the *Wheelock* facts of payment of a traffic fine, appears to have gone beyond merely excluding guilty pleas to minor traffic violations and to have fashioned a rule that also excludes guilty pleas to more serious violations. This expansion of the holding to situations beyond those at issue seems unnecessary as well as unwise. The probative value of admissions against interest, though minimal when pleas to minor violations are involved, is much greater when the plea is to a major offense." Note, 24 Kansas L Rev 193, 202 (1975). See also Robinson, *Civil and Criminal Evidence*, 1975 Ann Survey of Mich Law, 22 Wayne L Rev 447, 471-72 (1976).

If the Supreme Court is inclined to retain the *Wheelock* rule, at least as to misdemeanors, it could do so by the addition of a Rule 412 to the MRE which could read as follows:

"Evidence that a person has been convicted of a crime after trial, or plea or payment of a fine is not admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence, unless the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted."

If the Court wishes to retain the *Wheelock* rule as to all crimes, including felonies, the foregoing Rule 412 could be adopted with the deletion of the language "unless the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted."

**MRE 801(d)(2)(B)** is consistent with prior Michigan law in admitting adoptive admissions of a party. To the extent **MRE 801(d)(2)(B)** could authorize admission of a noncustodial admission by silence of an accused in the face of an accusation, it appears to conflict with *People v Bobo*, 390 Mich 355 (1973), which held that an accused's silence cannot be admitted against him. See Robinson, *Civil and Criminal Evidence*, 1974 *Ann Survey of Mich Law*, 21 Wayne L Rev 437, 476-478 (1975).

*Bobo*, however, was decided on constitutional rather than evidence grounds and thus **MRE 801(d)(2)(B)** would not directly conflict with *Bobo* since no effort has been made in the proposed Michigan rules to codify rules excluding evidence on constitutional grounds.

**MRE 801(d)(2)(C)** is consistent with prior Michigan law in authorizing admission of statements by a person authorized by a party to make a statement concerning the subject.

**MRE 801(d)(2)(D)** authorizes admission of a statement by the employee or agent of a party "concerning a matter within the scope of his agency or employment made during the existence of the relationship."

Prior Michigan law has been more restrictive, requiring preliminary proof that the employee or agent had authority from his principal to make the statement involved.

**MRE 801(d)(2)(E)** is consistent with Michigan law in authorizing admission of "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

**MRE 802** simply provides that: "Hearsay is not admissible except as provided by these rules." This rule is consistent with current Michigan law to the extent that hearsay is not admissible unless it falls within one of the recognized exceptions to the hearsay rule.

**MRE 803** governs exceptions to the hearsay rule where the availability of the declarant is immaterial to admissibility. Most of the **MRE 803** hearsay exceptions are generally consistent with prior Michigan law. See, e.g.:

1. **MRE 803(2)** (Excited utterance);
2. **MRE 803(3)** (Then existing mental, emotion or physical condition);
3. **MRE 803(5)** (Recorded recollection);
4. **MRE 803(9)** (Records of vital statistics);
5. **MRE 803(11)** (Records of religious organizations);
6. **MRE 803(12)** (Marriage, baptismal, and similar certificates);
7. **MRE 803(13)** (Family records);
8. **MRE 803(14)** (Records of documents affecting an interest in property);
9. **MRE 803(16)** (Statements in ancient documents);
10. **MRE 803(17)** (Market reports, commercial publications);
11. **MRE 803(18)** (Learned treatises);
12. **MRE 803(19)** (Reputation concerning personal or family history);
13. **MRE 803(20)** (Reputation con-

cerning boundaries or general history); and

14. **MRE 803(21)** (Reputation as to character).

The **MRE 803** hearsay exceptions which depart significantly from prior Michigan law are as follows:

1. **MRE 803(1)** admits statements describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. No prior Michigan authority specifically recognizes an exception for such statements; however, the admission of such statements may have been justified by Michigan courts from time to time in the past under the so-called "res gestae" exception to the hearsay rule.

2. **MRE 803(4)** admits certain statements made for purposes of medical diagnoses or treatment, including statements describing medical history, past or present symptoms, etc. While prior Michigan law admitted declarations of *present* physical or mental condition (unless made to a physician seen for purposes of litigation), prior Michigan law did not generally admit other types of statements (*e.g.*, medical histories) simply because they were made for purposes of medical diagnosis or treatment.

3. **MRE 803(6)** admits certain business records and **MRE 803(7)** permits proof of the nonoccurrence or nonexistence of certain matters by showing the absence of an entry in business records. These rules are generally consistent with MCLA 600.2146, the business records statute. The major difference between **MRE 803(6)** and prior Michigan law is that under **MRE 803(6)** statements of opinions or diagnoses contained in business records may also be admissible in appropriate circumstances. Such statements have not generally been admissible under prior Michigan law.

4. **MRE 803(8)** admits certain pub-

lic records and reports to prove matters recorded therein. **MRE 803(10)** permits proof of the absence of a public record or the nonoccurrence or nonexistence of certain matters which would have been recorded in a public record, by showing the absence of the applicable public record through testimony or a certificate from an authorized custodian of the records. These rules are generally consistent with prior Michigan law; however, **MRE 803(8)(C)** is inconsistent in authorizing admission of certain evaluative reports containing factual findings in civil cases and against the government in criminal cases "unless the sources of information or other circumstances clearly indicate lack of trustworthiness."

5. **MRE 803(15)** admits relevant statements in documents affecting an interest in property under certain circumstances. No prior Michigan authority was located authorizing admission or requiring exclusion of such evidence.

6. **MRE 803(22)** admits evidence of felony judgments to prove "any fact essential to sustain the judgment"; however, in criminal cases the government cannot offer criminal judgments against persons other than the accused except as may be permitted for impeachment. This rule is inconsistent with the Supreme Court's recent decision in *Wheelock v Eyl*, 393 Mich 74, 79 (1974), to the extent that **MRE 803(22)** would authorize proof of a felony conviction (by trial or plea) in a subsequent civil action arising out of the same occurrence. In *Wheelock* the Court held "that a criminal conviction after trial or plea, or payment of a fine is not admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence."

7. **MRE 803(23)** authorizes admission of certain judgments as to personal, family or general history, or boundaries if the same would be provable by reputation evidence. No prior



Michigan authority was located authorizing admission or requiring exclusion of such evidence.

**MRE 804** governs exceptions to the hearsay rule where the unavailability of the declarant is a condition of admissibility. The various tests of unavailability under **MRE 804(a)** (e.g., excused by privilege, persistent refusal to testify despite court order, lack of memory, death or disability, absence from jurisdiction) are generally consistent with prior Michigan law.

The **MRE 804** hearsay exceptions are generally consistent with prior Michigan law; however, they all have some variations:

1. **MRE 804(b)(1)** admits the former testimony of an unavailable declarant if the party against whom the testimony is presently offered (including a predecessor in interest in a civil case) "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." This rule is consistent with prior Michigan law except that: a) former testimony from a different proceeding is not admissible in Michigan against the accused in criminal cases; and b) no Michigan authority was located authorizing admission of former testimony against a "predecessor in interest." Since the Michigan criminal cases excluding former testimony from a different proceeding are based upon constitutional grounds of confrontation rather than evidence grounds, adoption of **MRE 804(b)(1)** would not necessarily change Michigan law.

2. **MRE 804(b)(2)** authorizes admission of statements made under belief of impending death (i.e., dying declarations). Unlike prior Michigan law, however, the statements may be admitted in civil cases as well as homicide cases and the declarant need not have died, so long as belief of imminent death existed when the statement was made and the declarant is

unavailable at trial.

3. **MRE 804(b)(3)** authorizes admission of statements against interest, including statements against penal interest as well as pecuniary and proprietary interest. Prior Michigan law is in accord, except that the Supreme Court in *People v Edwards*, 396 Mich 551 (1976) recently rejected the requirement found in **MRE 804(b)(3)** that: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statements." If the court wishes to retain the holding in *Edwards* rejecting the corroboration requirement, it can do so easily by deleting the foregoing sentence from **MRE 804(b)(3)**.

4. **MRE 804(b)(4)** is generally consistent with prior Michigan law in recognizing a hearsay exception for statements of personal and family history by unavailable declarants. This exception is sometimes called the "pedigree exception." However, **MRE 804(b)(4)** is inconsistent with prior Michigan law: a) in rejecting the requirement that the statements be made when there was no motive to falsify (i.e., "ante litem motam"), and b) in rejecting the requirement that the declarant be related by blood or marriage to the person of whose pedigree he speaks. **MRE 804(b)(4)** requires only "intimate association."

Both **MRE 803** and **MRE 804** contain so-called residual hearsay exceptions. Under **MRE 803(24)** and **804(b)(5)**, hearsay statements which fall within none of the specific exceptions may nevertheless be admitted, provided that they have "equivalent circumstantial guarantees of trustworthiness" and if they meet certain other specific requirements, including pre-trial notice of intent to offer the evidence. The Senate Judiciary Committee, speaking of the identical federal

counterparts to **MRE 803(24)** and **804(b)(5)** said:

"It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements which do not fall within one of the other exceptions contained in 803 and 804(b)."

**MRE 805** is consistent with prior Michigan law in authorizing admission of hearsay within hearsay "if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

**MRE 806** permits the credibility of a hearsay declarant to be attacked like any other witness and specifically rejects the requirement of prior Michigan law that before extrinsic evidence of the declarant's inconsistent statements may be offered (even to impeach an unavailable hearsay declarant), the declarant must have been afforded an opportunity to deny or explain the statement.

#### **Article IX**

##### **Authentication and Identification**

The three rules in Article IX list the traditional means of identifying or establishing the authenticity of documents, telephone conversations, data compilations, and the like. Except for minor adjustments to make the language appropriate to state circumstance, the rules are drawn from the Federal Rules of Evidence and are generally consistent with prior Michigan law.

**Rule 901** states that the requirement of authentication or identification is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." The rule then gives, "by way of illustration only, and not by way of limitation," examples of authentication conforming with the requirements of the

rule, such as testimony by a witness with knowledge, circumstantial authentication, ancient documents (here twenty years, rather than the thirty required in prior Michigan law), or any method "provided by the Supreme Court of Michigan or by a Michigan statute." **MRE 902** recognizes some writings, mostly public, as authentic without extrinsic evidence. Among these self-authenticating items are certain domestic and foreign public documents, certified copies of public records, newspapers and periodicals, trade inscriptions, acknowledged documents, and the like. (It should be noted that **MRE 901** and **MRE 902** do not satisfy other possible objections, such as hearsay, but satisfy only the requirement of authentication as a condition precedent to admissibility.)

**MRE 903** excuses the production of a subscribing witness unless by law the validity of the instrument is conditional on the subscription.

#### **Article X**

##### **Contents of Writings, Records, and Photographs**

What lawyers often call the "best evidence rule" is the subject of Article X. The eight rules in this Article, though generally consistent with prior Michigan practice, provide both clarification and accommodation to contemporary modes of recording, storing, and copying information.

**MRE 1002** employs traditional terms to state the basic rule:

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or statute."

**MRE 1001**, however, defining the terms used in Article X, creates the concept of a "duplicate," which is:

"a counterpart produced by the same impression as the original, or from the same matrix, or by means of

photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques, which accurately reproduces the original."

Then, **MRE 1003** makes duplicate admissible

"to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

This patently useful procedure has not heretofore been available in Michigan except for certain business records, and even there with substantial restrictions. See *MCLA* 600.2146-8.

As in prior Michigan practice, **MRE 1004** excuses production of the original if the original is lost or destroyed, cannot be obtained by judicial process, is in possession of the opponent and the opponent is on notice that the original will be needed at the hearing, or relates to a collateral matter. If the original is thus excused the proponent may offer any other evidence of contents, there being no "degrees" of secondary evidence recognized. Prior Michigan law was unclear on this matter.

*Baroda State Bank v Peck*, 235 Mich 542 (1926), is often cited as authority for the proposition that Michigan recognizes no degrees of secondary evidence. In fact, however, the *Baroda* opinion was divided 4-4, thus affirming a trial court ruling that there are degrees of secondary evidence. **MRE 1004's** resolution of the issue may or may not have changed Michigan law.

By the terms of **MRE 1006**, certified or compared copies of public records are admissible, as in prior Michigan practice.

Summaries of voluminous writings, recordings, and the like, which cannot be conveniently examined in court, may be presented in the form of a

chart, summary, or calculation, under the provisions of **MRE 1006**. The originals or "duplicates" must be made available for examination or copying by other parties, and the judge may order that they be produced in court.

**MRE 1007** provides yet two more ways to establish the contents of documents: by the testimony or deposition of the party against whom offered or by his written admission. An extrajudicial oral admission will not suffice.

**MRE 1008** is a particularized reference to functions of judge and jury in dealing with questions of fact preliminary to determinations of admissibility, more generally dealt with in **MRE 104**. Here, as in **MRE 104**, the question of whether the condition of fact rendering secondary evidence admissible has been fulfilled (e.g., whether the original has been lost) is left to the judge. But **MRE 1008** leaves the "preliminary question" to the jury when an issue is raised

"(a) whether the asserted writing ever existed, or (b) whether another writing . . . produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents . . . ."

In all of these particulars, there is no departure from prior Michigan practice.

## Article XI

### Miscellaneous Rules

**MRE 1101**, derived from the Uniform Rules of Evidence (1974) because more appropriate to state practice than the federal counterpart, makes the Michigan Rules of Evidence inapplicable, as mentioned in the discussion of **MRE 101**, *supra*, to preliminary questions of fact, grand jury proceedings, miscellaneous proceedings, and summary contempt proceedings. The rule's only departure from the Uniform Rule lies in omission of an exception for preliminary examinations, thus making the Michigan

Rules of Evidence applicable to preliminary examinations, as in prior Michigan practice. See *People v Walker* 385 Mich 565 (1971); *People v Domin*, 71 Mich App 315 (1976).

**Rule 1102** authorizes citation of the rules as **MRE** — a practice to which any reader of this article is by now accustomed.

### CONCLUSION

As can be discerned from the foregoing, in most instances the proposed Michigan Rules of Evidence are consistent with prior Michigan law. Those proposed rules which differ from prior Michigan law involve changes which are logical extensions of established evidence principles and are consistent with the trend of authority in the United States and the example set by the Federal Rules of Evidence. The changes, in other words, are evolutionary rather than revolutionary.

Current Michigan evidence law must be culled, often with great difficulty, from Supreme Court decisions (often outdated), Court of Appeals decisions (sometimes conflicting), statutes and court rules. The adoption of the proposed Michigan Rules of Evi-

dence will not, of course, end all problems in the law of evidence. If the rules are adopted, however, everyone will start from the same source and that source will be convenient for immediate reference during trial.

Michigan is fortunate to have had the Federal Rules of Evidence available as a model for the proposed Michigan evidence rules. The Federal Rules were the product of over thirteen years of study and debate by eminent judges, lawyers, law professors and members of Congress.

Adoption of the proposed Michigan Rules of Evidence by the Supreme Court will: 1) provide Michigan judges and lawyers with an authoritative statement of evidence law which will be easy to use and convenient for immediate reference; 2) allow Michigan judges and lawyers to benefit from developing precedents from the federal courts and other states interpreting nearly identical rules; and 3) prevent the confusion and injustice which could result from one set of evidence rules for federal courts in Michigan and another set of rules for Michigan state courts.

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